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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MARY A. PINNEY and DAVID A. PINNEY.	
MARY A. PINNEY, Respondent, v. DAVID A. PINNEY, Appellant.	D059342 (Super. Ct. No. DS31309)

APPEAL from an order of the Superior Court of San Diego County, Gerald C. Jessop, Judge. Affirmed.

Appellant David Pinney appeals the family court's order permitting Mary Pinney[1] to relocate from San Diego, California to Texas with their minor children. David contends the record is unclear the family court properly evaluated (1) the likely detriment to the children from Mary's relocation, particularly considering his allegations

1 We refer to the parties by their first names to avoid confusion, and do not mean any disrespect.

that Mary committed domestic violence against him; (2) the detriment to David from the court's order prohibiting visitation at David's residence in Tijuana, Mexico; and (3) a modification of David's child support payments. We affirm.

BACKGROUND[2]

In January 2011, the family court held a hearing on an order to show cause regarding Mary's request to modify the visitation order to permit her to relocate to Texas with the couple's three children, who at the time were ages ten, eight and four. David was self-represented, and testified he was unable to afford living in San Diego and therefore was living in Mexico. He was unemployed after his involuntary separation from the United States Navy. He testified Mary had committed domestic violence against him.

Mary testified David had not paid child support since February 2010. She also testified on direct examination regarding visitation in Mexico:

"[Counsel:] Okay. Do you know where [David] lives in Mexico?

"[Mary:] No.

"[Counsel:] Are there concerns—do you have any concerns about him taking the children and not returning them?

"[Mary:] Yes I do.

"[Counsel:] What do you base those concerns on?

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2 The clerk's transcript on appeal is limited to the minutes of the hearing held on January 27, 2011; the findings and order following that hearing; the notice of appeal; and, the notice designating the record on appeal. The reporter's transcript of the hearing is also included in the record.

"[Mary:] The fact that he once told me that I would literally have to try and go pick the children up. I don't own a passport."

Mary conceded she had physically attacked David approximately a decade earlier, but she denied David's accusation she had scratched him on October 29, 2010. She testified that when she was pregnant with their last child, David threw a picture at her.

The court and David discussed domestic violence and the children's possible visitation in Mexico in this exchange:

"[The Court:] . . . I reviewed the [December 2010 San Diego Superior Court Family Court Services' (hereafter FCS)] record, the report here, and it clearly says that your relationship with [Mary] is problematic at best. You know what that means.

"[David:] Yes, I understand it, your honor. And she also didn't mention domestic violence.

"[The Court:] . . . By saying problematic I'm not saying it is your problem. I'm not saying it is her problem. It is both your problems. Okay. Now my problem is I can't change your relationship with her, but I'm concerned about the fact that [Mary]—that if you have custody of the children in Mexico—doesn't know where the children are.

"[David:] That is—

"[The Court:] That fact has been amplified in the [FCS] report."

At the end of the proceedings, David repeatedly interrupted the court while it issued its ruling. According to the reporter's transcript, he became emotional, left the courtroom, and returned a few minutes later. The court found that Mary had de facto sole legal and physical custody of the children, and a material change of circumstances

necessitated a change in custody and visitation orders under *Montenegro v. Diaz* (2001) 26 Cal.4th 249. It found that Mary was relocating to Texas in good faith upon her involuntary discharge from the military, and it was in the best interests of the children for them to relocate with her. Mary was not currently receiving child support from David.

The court found it had jurisdiction to resolve the ongoing custody matter, and generally adopted the FCS recommendation. Specifically, the court required Mary to provide David with her Texas address and telephone number and access to the children's school records to track their progress; enroll the children in therapy in Texas; provide the children with a means to communicate with David by computer on a daily basis, with David having the responsibility to arrange the necessary equipment or accounts to facilitate that communication; permit David visitation with the children in San Diego County, with David paying their outbound airfare and Mary paying their return airfare. Further, David was ordered to notify Mary two weeks in advance of the visitation and give her his itinerary with his address and telephone number. Mary was not required to allow the visit if he refused to provide that information. The court adopted the holiday schedule set forth in the FCS report, and denied visitation with David in Mexico.

DISCUSSION

In general, "[t]he standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) In *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*), the court addressed the standard that applies when a parent files a motion to modify a prior custody order because of a custodial parent's planned move with the child. In *LaMusga*,

the trial court "ordered that primary physical custody of two minor children would be transferred from their mother to their father if their mother moved to Ohio." (*Id*. at p. 1078.) The *LaMusga* court concluded: "[J]ust as a custodial parent does not have to establish that a planned move is 'necessary,' neither does the noncustodial parent have to establish that a change of custody is 'essential' to prevent detriment to the children from the planned move. Rather, the noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody. The likely impact of the proposed move on the noncustodial parent's relationship with the children is a relevant factor in determining whether the move would cause detriment to the children and, when considered in light of all of the relevant factors, may be sufficient to justify a change in custody. If the noncustodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children." (*Ibid*.)

The *LaMusga* court set forth the factors that a family court generally should consider in exercising its discretion whether to grant or deny a custodial parent's request to relocate with a minor child. They include the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the

reasons for the proposed move; and the extent to which the parents currently are sharing custody. (*LaMusga, supra*, 32 Cal.4th 1072 at p. 1101.) Finally, "the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements." (*Burgess*, *supra*, 13 Cal.4th at pp. 32-33; see also *LaMusga*, at p. 1093; *Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 999.)

I.

David challenges the trial court's analysis of Family Code[3] section 7501 and the *LaMusga* factors, and the likely detriment the children would suffer from relocation, pointing out, "While the trial court has adopted the [mediator's] recommendations it has not included any of the [] mediator's analysis of the present matter." On approximately nine occasions in his opening brief, he contends that the record is undeveloped to sufficiently ascertain if the trial court took into consideration one or other of the *LaMusga* factors.[4] He concludes, "[t]he matter should be remanded for further hearings with specific instructions that the trial court utilized [*sic*] the guidelines in *LaMusga* in making

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3 All statutory references are to the Family Code.

4 For example, David contends, "[i]t is mo[r]e difficult to determine from the transcripts of proceedings if the court made an analysis of the detriment to the children." He further argues, "it is unclear from the record of the proceedings if the [FCS] mediator met with the minor children or did any background investigation of the children's interests. In addition there is no indication as to whether David attempted to cross-examine the mediator at [the] hearing on January 27, 2011."

its determination as to whether the move-away should be granted or alternatively custody should change to David."

None of David's claims is supported by the record. " ' "Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs." ' " (*In re Hochberg* (1970) 2 Cal.3d 870, 875, disapproved on other grounds as stated in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) " 'A fundamental principle of appellate practice is that an appellant " 'must affirmatively show error by an adequate record. . . . Error is never presumed.' " ' " (*Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125-1126.) "A judgment or order of a lower court is *presumed to be correct* on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133, italics added.) "If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, fn. 14; see also *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) We are not required to search the record to determine whether it contains support for David's contentions. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

Based on the above case law, we treat David's claims as forfeited. Any failure to develop the record in this case stems from David's choice to interrupt the family court

and his subsequent failure to clarify the court's ruling, or augment the record to include the complete FCS report and other materials.

In any event, even considering the claims on the merits, and in light of our review of the record before us, we conclude the court provided David ample opportunity to present evidence and argue his case. The court specifically stated it was guided by the principles outlined in *Montenegro v. Diaz*, *supra*, 26 Cal.4th 249, a case that discusses the criteria for a variation of the best interest of the child standard called the changed circumstance rule: "Under the so-called changed circumstance rule, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification." (*Id*. at p. 293.) Here, taking into account the factors the family court analyzed in granting Mary's move-away petition and crafting the visitation order, we discern no abuse of discretion. David, as the non-custodial parent, did not meet his burden of showing that Mary's relocation would cause detriment to the children, as he was required to do under *Burgess*, *supra*, 13 Cal.4th 25, 38.

David makes three other claims that we reject under the same analysis: David claims, first, "[t]he transcript is devoid of discussion of whether domestic violence occurred or not." Second, "[he] has in the past enjoyed visitation in Mexico. Why that is no longer allowed is a bit of a mystery except to [*sic*] that in a soliloquy David seems to reference a past order entered by a previous Judge in the matter." Third, "[t]here is no discussion of the modification of child support or who should pay for the accommodations in San Diego though it is implied that it would be David's burden."

We respond to these points as follows: David has not shown the family court abused its discretion in evaluating David's domestic violence claim in the court's overall detriment analysis. As to visitation, the family court specifically referred to section 3048 regarding the risk of child abduction in denying visitation in Mexico. Finally, in leaving unmodified David's child support payment order, the family court considered David's testimony regarding his financial hardship. Like David, we infer from the family court's order that he is responsible for paying for the children's accommodations during their visits in San Diego County. We conclude David has shown no basis to remand the matter to the family court for further proceedings.

DISPOSITION

The judgment is affirmed. David Pinney shall pay Mary Pinney's costs on appeal.

O'ROURKE, J.

WE CONCUR:

McINTYRE, Acting P. J.

AARON, J.